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## **Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates**

*by Andrea Büchler and Eveline Schneider Kayasseh*



**University of  
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# Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates

by Andrea Büchler\* and Eveline Schneider Kayasseh\*\*

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## Abstract

The importance of family and lineage runs like a golden thread through Islamic history, thought, and law. However, many children around the Islamic world are deprived of the opportunity to develop and grow up in their own biological families. With the aim to preserve blood ties as the only means of legitimate filiation, adoption is prohibited in most countries influenced by or based on Islamic law or Shari'a. For this reason, alternative forms of adoption have been developed as well as a model of legal fostering called kafalah. A kafalah enables children deprived of a family environment to be legally raised on a permanent basis by families other than their own. First, this paper looks at the legal framework of filiation and kafalah in classical Islamic law. Second, three modern-day approaches on regulating kafalah as a means of child protection will be outlined. We have chosen three countries from the Arab world with different legal-historical backgrounds, namely Morocco, Egypt, and the United Arab Emirates. The three countries have enacted child-specific legislation as well as specific legislation on the regulation of fosterage of children, of kafalah. We will look at similarities and differences among the three legislative frameworks and pinpoint benefits and risk factors.

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## I. Introduction

Orphans and children deprived of family care have been a social reality since ancient times, and so have ways to care for such children. These ways differ from culture to culture. Whereas in the “West”, adoption in the sense of creating legal filiation between adopter and adoptee has served as the main instrument to integrate abandoned and orphaned children into new families, in Islam, it is generally not regarded permissible. Most Muslim-majority states maintain this prohibition today. However, Islamic law provides for a legal alternative called *kafalah*. With the increase of movements and migration across continents and countries, family formation across borders has become a wide spread phenomenon, and the institution of *kafalah* has become internationalised.

The following article on fostering and adoption of children will take departure in classical Islamic law by considering what the classical sources have to say to legitimate filiation, orphans, adoption and fostering. In order to illustrate the modern relevance of the classical law, we will outline what the concept of *kafalah* entails, what its legal prerequisites and implications are, and how the laws of three different Muslim-majority countries deal with legal parentage and fostering.

## II. Filiation in Islamic Law

### 1. Establishment of Filiation

The importance of family and lineage runs like a golden thread through Islamic history and thought. From a linguistic point of view, lineage is established through father and mother; however, in the legal sphere lineage refers to the agnatic line of descent only, which is a result of the paternalistic structure of society.<sup>1</sup> The paternal tie defines and determines several seminal rights and duties in Islamic law;<sup>2</sup> in itself, it is a right that gives other rights.<sup>3</sup> The rights given by the paternal relationship include custody and guardianship, maintenance, rights of citizenship and name, and, importantly, inheritance.

In particular, the father must provide his offspring with clothing, food, shelter and education until they reach maturity (in case of a boy) or marry (in case of a girl). The term used in Islamic law for paternity in the sense of lineage is *nasab*.<sup>4</sup> In many cultures and up to this day, the relevance of a person’s kin is shown by the use of patronyms (ben, bint, i.e., son, daughter of) which highlights the importance of the paternal tie. In order to have a proper *nasab*, certain preconditions must be fulfilled.

#### a) Children Born in Wedlock

In Islamic law, proper filiation to the father is established by procreation under the further condition that the parents of the child were legally married at the time of conception of the child.<sup>5</sup> To the

<sup>1</sup> See e.g. SHABANA AYMAN, The Islamic Law of Paternity between Classical Legal Texts and Modern Contexts: From Physiognomy to DNA Analysis, *Journal of Islamic Studies*, Vol. 25 (2014), 1-32, at 1, 3.

<sup>2</sup> WELCHMAN LYNN, *Women and Muslim Family Laws in Arab States*, Amsterdam 2007, at 143.

<sup>3</sup> See e.g. CLARKE MORGAN, *Islam and New Kinship*, New York 2009, at 96.

<sup>4</sup> Referring to a male genealogical line, *nasab* has been described as “the most fundamental organising principle of Arab society”. See ROSENTHAL FRANZ, *Nasab*, in: BEARMAN PERI et al. (eds.), *Encyclopaedia of Islam*, 13 Vol., Leiden 1997-2009, at 967.

<sup>5</sup> NASIR JAMAL J., *The Islamic Law of Personal Status*, 3<sup>rd</sup> edition, Leiden 2009, at 81; SHABANA, *supra* n. 1, at 1; BARGACH JARMILA, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*, Lanham 2002, at 56.



mother it is established by birth.<sup>6</sup> The requirement of marriage is linked to the criminalisation of extramarital sex, called *zinā*, which is one of the very few crimes against God for which a set punishment (*ḥadd*) is demanded by the Quran and the Sunna (the basic sources of Islam). In addition, the marriage requirement serves to maintain “genealogical clarity”. A well-known *fiqh* principle confirms the interconnectivity of marriage, procreation and *nasab* as well as a desire to uphold proper sexual mores in society. It says that “the child (belongs to) the conjugal bed” (*al-walad li-l-firāsh*).<sup>7</sup>

In classical Islamic law, marriage is a civil contract that requires the contracting parties to be of sound mind, have attained puberty, and have consented to the marriage. Muslim men of legal capacity typically contract their own marriages, while women must usually have a guardian in marriage, a *walī*, who contracts their marriage for them. Marriage is concluded by the offer (*ijāb*) of one contracting party and the acceptance (*qabūl*) of the other, occurring at the same time before two – generally male – witnesses.<sup>8</sup> The marriage contract is classified by different degrees of validity which have a bearing on the legitimacy of the child born from this union: valid (*ṣaḥīḥ*), irregular (*fāsid*), and void (*bāṭil*) marriages.<sup>9</sup>

Legitimacy presupposes birth during a regular or irregular (but not void) marriage within specific pregnancy terms and with consummation having been possible. In order to avoid illegitimate birth, the Islamic jurists set minimum and maximum terms of gestation which are rather generous: A child is deemed legitimate if born after six months of pregnancy and up to two or even more years of pregnancy depending on the school of law.<sup>10</sup>

<sup>6</sup> NASIR, *supra* n. 5, at 146, 154; AZ-ZUBAIR KABIR BANU MUHAMMAD, Who is a Parent? Parenthood in Islamic Ethics, *Journal of Medical Ethics*, Vol. 33 (2007), 605-609, at 606 ff.; KREUTZBERGER KAI, Single Mothers and Children Born out of Wedlock in the Kingdom of Morocco, *Yearbook of Islamic and Middle Eastern Law*, Vol. 14 (2008-2009), 49-82, at 62. This principle derives from the Quran (58:2) which states: “[...] none can be their mothers except those who gave them birth [...]”. See e.g. Art. 146 Moudawana which states that filiation to the mother has the same effects irrespective of legitimate or illegitimate birth.

<sup>7</sup> Cf. PEARL DAVID/MENSKI WERNER, *Muslim Family Law*, London 1998, 399 f.; POLLACK DANIEL et al., Classical Religious Perspectives of Adoption Law, *Notre Dame Law Review*, Vol. 79 (2004), 101-158, at 734; SHABANA, *supra* n. 1, at 6; EICH THOMAS, Constructing Kinship in Sunni Islamic Legal Texts, in: Tremayne Soraya/Inhorn Maria C. (eds.), *Islam and Assisted Reproductive Technologies*, New York/Oxford 2012, 27-52, at 37; WELCHMAN, *supra* n. 2, at 142; AZ-ZUBAIR, *supra* n. 6, at 606; CLARKE, *supra* n. 3, at 47. Regarding the *firāsh* principle in history, see LANDAU-TASSERON ELLA, Adoption, Acknowledgment of Paternity and False Genealogical Claims in Arabian and Islamic Societies, *Bulletin of the School of Oriental and African Studies*, Vol. 66 (2003), 169-192, at 176 ff.

<sup>8</sup> PEARL/MENSKI, *supra* n. 7, at 139 ff.; NASIR, *supra* n. 5, at 44 f.; ESPOSITO JOHN L., Women in Muslim Family Law, Syracuse/New York. 2001, at 15 f. See also ALI KECIA, Marriage in Classical Islamic Jurisprudence, in: Quraishi Asifa/Vogel Frank (eds.), *The Islamic Family Contract*, Cambridge 2008, 11-45, at 13. In Sunni Islam, the place of one man may be taken by two female witnesses: ESPOSITO, *supra* n. 8, at 16; NASIR, *supra* n. 5, at 56. Regarding the issue of state registration of marriage and official marriage documents as proof of marriage, see WELCHMAN, *supra* n. 2, at 53 ff. See also SONNEVELD NADIA, Rethinking the Difference between Formal and Informal Marriages in Egypt, in: Voorhoeve Maaïke (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*, London 2012, 77-107.

<sup>9</sup> See PEARL/MENSKI, *supra* n. 7, at 143 ff.; see also NASIR, *supra* n. 5, at 75 ff.; ESPOSITO, *supra* n. 8, at 17.

<sup>10</sup> Based on Quran (31:14) and (46:15), there is a consensus among Islamic jurists regarding the minimum period of gestation at six months. The maximum term of gestation was in contestation among Islamic jurists, ranging from two (Hanafi School of Law) to four (Shafi'i, Maliki, and Hanbali School of Law) or even more years, thus potentially minimising illegitimacy and adultery accusations. In Shia Islam, there is a consensus that one year is the maximum period of gestation; according to some jurists, this period might be shorter. See KHAN ARIF ALI/KHAN TAUQIR MOHAMMAD, Family Law in Islam, in: *Encyclopedia of Islamic Law*, Vol. 5, New Delhi 2009, at 188; BAKHTIAR LALEH, *Encyclopedia of Islamic Law*, Chicago 1996, at 456 ff.; NASIR, *supra* n. 5, at 146. Among the codified rules of family law that have been adopted in Arab countries in the present and past centuries exist provisions pertaining to the minimum and maximum term of pregnancy. Regarding the maximum term of pregnancy, legislators have introduced a one-year rule into most Arab Personal Status Laws as a substantive rule or rule of procedure, citing medical authorities as support. WELCHMAN, *supra* n. 2, at 143; see also NASIR, *supra* n. 5, at 146.

Modern state laws are also rather generous in their presumption of a child's legitimacy and thus in granting *nasab*. This is at least true as long as there is a claim of marriage between a particular woman and a man. Thus, children born from a marriage of doubtful validity or children born following an "engagement" of her or his parents may be considered legitimate.<sup>11</sup> In addition, parentage is often considered to be an indication of the existence of a marriage as the principle generally holds that the establishment of lineage establishes wedlock and not vice versa.<sup>12</sup>

## b) Other Forms of Filiation

Apart from marriage, parentage (and with it legitimacy) may also be established through acknowledgment by the father, the mother<sup>13</sup> (who is neither married nor in her *iddat*<sup>14</sup>) or the child. *Iqrār* requires that four basic conditions are met (which are varied slightly to fit the respective individual). First, the child must be of unknown parentage; second, there must be a certain age difference between father and child so that parentage is plausible;<sup>15</sup> third, the father must indicate that the child is legitimate and not the offspring of *zinā*; fourth, if the child is of age, he or she must agree to the acknowledgement. If the mother is married or in her waiting period, her acknowledgement shall only establish the paternity of the husband if this individual confirms the acknowledgement.<sup>16</sup> Finally, aside from marriage and *iqrār*, the Islamic religious legal texts acknowledge other means of establishing parentage to a child: *al-bayina* (evidence) and *al-qyāfa* (the comparing of physical characteristics).<sup>17</sup> Used in classical times, physiognomy (especially the characteristics of the feet) was mainly used in cases where paternity was contested between two or more men.<sup>18</sup> The rules of *al-bayina* have been codified under some modern family laws such as Morocco, Tunisia and Algeria.<sup>19</sup>

## 2. Effects of Filiation

Only a child that is born legitimately can become a full member of society. In order to protect the child's legitimate status, once the legal bond to the father is established, it is difficult to break it. As

<sup>11</sup> See WELCHMAN, *supra* n. 2, at 145; see also NASIR JAMAL J., *The Status of Women under Islamic Law and Modern Islamic Legislation*, 3<sup>rd</sup> edition, Leiden/Boston 2009, at 174.

<sup>12</sup> WELCHMAN, *supra* n. 2, at 144; see also KHAN/KHAN, *supra* n. 10, at 207. – On this chapter, see also BÜCHLER ANDREA/SCHNEIDER KAYASSEH EVELINE, *Medically Assisted Reproduction in Egypt, Iran, Saudi Arabia and the United Arab Emirates*, *European Journal of Law Reform*, Issue 2 (2014), 430-464, at 432 ff.

<sup>13</sup> It must be pointed out, however, that not all schools consider the acknowledgement of a woman valid: See BARGACH, *supra* n. 5, at 60; KHAN/KHAN, *supra* n. 10, at 210. See also ESPOSITO, *supra* n. 8, at 27.

<sup>14</sup> Waiting period following death of the husband or divorce during which a woman is not allowed to get remarried. Regarding the *iddat*, see ESPOSITO, *supra* n. 8, at 20 f.; NASIR, *supra* n. 5, at 137 ff.

<sup>15</sup> See PEARL/MENSKI, *supra* n. 7: real paternity must be possible, i.e., the acknowledger must have reached the minimum age of puberty and the minimum period of gestation must have passed by.

<sup>16</sup> Concerning the whole, see NASIR, *supra* n. 11, at 176; KHAN/KHAN, *supra* n. 10, at 214. See also ESPOSITO, *supra* n. 8, at 27; NASIR, *supra* n. 5, at 150 ff.; KHAN/KHAN, *supra* n. 10, at 210 f. Further see LANDAU-TASSERON, *supra* n. 7, at 176.

<sup>17</sup> In detail see SHABANA, *supra* n. 1, at 8ff. – Some schools also accept "drawing of lots" (*al-qur'ah*) as a valid means to establish paternity if one is unable to determine the paternity of a child by other means: SUJIMON M. S., *The Treatment of the Foundling (al-Laḳīṭ) According to the Ḥanafis, Islamic Law and Society*, Vol. 9 (2002), 358-385, at 378.

<sup>18</sup> See SUJIMON, *supra* n. 17, at 374 ff., who discusses in which cases the Ḥanafis accepted physiognomy as proof of paternity. See also AL-AZHARY SONBOL AMIRA, *Adoption in Islamic Society: A Historical Survey*, in: Warnock Fernea Elizabeth (ed.), *Children in the Muslim Middle East*, Austin 1995, 45-67, at 53 f. See BARGACH, *supra* n. 5, at 60, on the revival of this practice in modern times.

<sup>19</sup> See NASIR, *supra* n. 11, at 178; BARGACH, *supra* n. 5, at 60.

an example, a husband may only deny paternity under a valid marriage contract by claiming that his wife was infidel. If the father has not previously acknowledged his paternity or confirmed the acknowledgment of the mother or the child, he may start a judicial procedure called *li'an* by claiming under oath that his wife committed adultery and dispute his parentage whereas the wife denies these allegations. Under these circumstances, the judge will rule the separation of the spouses which amounts to an irrevocable dissolution of marriage and to the illegitimacy of the child.

### 3. Effects of Lack of Filiation

Anyone born outside of marriage is considered an “illegitimate child”. He or she will be deprived of the support that the father and his family owe legitimate children<sup>20</sup> and will take the mother’s name. This is considered a shame in societies where patriarchal lineage is highly valued, especially for boys who are expected to pass on lineage through their name.<sup>21</sup> Illegitimate children in many instances face a life on the fringes of society, as will their mothers.

Particularly unwed mothers who give birth will face harassment from family and community members. In extreme cases, unwed mothers may fear for their lives if family members perceive the illegitimate birth as a transgression against “family honour”. In addition, they may be tried and punished for adultery (*zinā*). Given the social stigma of illegitimacy, mothers often see no alternative other than to abandon the baby in the hope of giving him or her a “better life” in a loving family, and sometimes also to protect their already existing family and their own life.<sup>22</sup>

## III. Adoption in Islamic System and Society

### 1. Historical Background

In a historical perspective, the concept of adoption as of giving the child the status of one’s own rightful offspring by adopting him or her was not foreign to what we call today the “Middle East”. Before the advent of Islam, in the *Jahiliyya*, or pre-Islamic period, adoption (*tabannī* from the Arabic word *ibn*, which means “son”) was practiced in the sense of creating a permanent parent-child relationship between persons biologically not related to each other.<sup>23</sup> In pre-Islamic tribal Arabia, it is

<sup>20</sup> NASIR, *supra* n. 5, at 119, 147 f.; NASIR, *supra* n. 11, at 119, 172; see also PEARL/MENSKI, *supra* n. 7, at 400; AL-AZHARY, *supra* n. 18, at 50; KHAN/KHAN, *supra* n. 10, at 205; WELCHMAN, *supra* n. 2, at 142; Quran (24:6-9). NASIR, *supra* n. 5, at 148 and *idem*, *supra* n. 11, at 172, points out that father and child would remain un-marriageable to each other.

<sup>21</sup> FORTIER CORINNE, *Le droit musulman en pratique: genre, filiation et bioéthique*, Droit et Cultures, Vol. 59 (2010), 1-19, at 9; BARRAUD ÉMILIE, *L’adoption au prisme du genre: l’exemple du Maghreb*, CLIO, Vol. 2 (2011), 153-165, at 160.

<sup>22</sup> On the situation of women who have children out of wedlock see, e.g., BARGACH, *supra* n. 5, at 133; ABDUL-HAMID YARA, *Child Rights Situation Analysis Middle East and North Africa*, A Report Commissioned by Save the Children Sweden, Regional Office for the Middle East and North Africa, 2<sup>nd</sup> edition, Beirut 2011, at 77, 110. See also FISHER BETSY, *Why Non-Marital Children in the MENA Region Face a Risk of Statelessness*, Harvard Human Rights Journal Online, January 2015, 1-8, at 5f. It must be highlighted that the profiles of mothers who decide to give up their new-born vary highly. Also, there are myriad reasons why mothers decide to take this step.

<sup>23</sup> There is some disagreement in the doctrine regarding the prevalence of adoption in pre-Islamic times. See LANDAU-TASSERON, *supra* n. 7, at 171 f., who points to the fact that the number of recorded adoptions was in fact very small. But see AL-AZHARY, *supra* n. 18, at 46, who maintains that widespread adoption was the norm.



presumed that adoption mainly took place to strengthen the work force of clans and tribes for economic and defence reasons<sup>24</sup> and in order to safeguard progeny.<sup>25</sup>

In these patriarchal societies, the adoptees were usually male,<sup>26</sup> some were free men and others freed slaves,<sup>27</sup> and some of them took the name of the adopting father.<sup>28</sup> The adoption could take place at any time in a person's life and irrespective of whether their parents were still alive or not.<sup>29</sup> Indeed, solid data regarding the function and effects of adoption do hardly exist.<sup>30</sup> What is certain though, is that adoption became widely absent in the Middle East after the advent of Islam.

The origins of the prohibition of adoption are not quite certain. Some argue that by prohibiting adoption the prophetic message aimed at replacing the traditional tribal bonds with the sense of belonging to the Islamic community, the *umma*.<sup>31</sup> Others refer to textual evidence which underline the importance of biological ancestry<sup>32</sup> and the episode known as the "Zayd incident".<sup>33</sup>

After having adopted the former slave Zayd Ibn Hāritha, Mohammad desired to marry his cousin Zainab bint Ġaḥṣ who was Zayd's former wife and his ex-daughter in law. However, the marriage was considered incestuous according to existing customs and rules.<sup>34</sup> According to Islamic tradition, the Quranic verses (33:37-40) were revealed in this context. These verses as well as the later revealed verses (33:4-5) asserted the legality of the Prophet's marriage to Zainab. It was argued that since adoption was prohibited and had no effect, the Prophet had no male child and therefore Zainab did not become his daughter in law.<sup>35</sup> From then on, "adopted" children could no longer take the name of their adoptive parents and there were no marriage impediments between them and no mutual rights of inheritance.<sup>36</sup>

<sup>24</sup> Cf. AL-AZHARY, *supra* n. 18, at 46. See also MATTSON INGRID, Adoption and Fostering, in: Suad Joseph (ed.), *Encyclopedia of Women & Islamic Cultures: Family, Law, and Politics*, Leiden 2003-2007, at 1: Since the adoptive parents would manage the orphan's property, self-interest was oftentimes at the bottom of adoption.

<sup>25</sup> BARRAUD ÉMILIE, Les multiples usages sociaux de la Kafalah en situation de migration: protection et non protection des mineurs recueillis, e-migrinter, no. 2 (2008), 133-142, at 133.

<sup>26</sup> MATTSON, *supra* n. 24, at 1; LANDAU-TASSERON, *supra* n. 7, 173.

<sup>27</sup> MATTSON, *supra* n. 24, at 1; AL-AZHARY, *supra* n. 18, at 46.

<sup>28</sup> LANDAU-TASSERON, *supra* n. 7, at 170; AL-AZHARY, *supra* n. 7, at 48; BARRAUD, *supra* n. 25, at 133.

<sup>29</sup> SUJIMON, *supra* n. 17, at 370.

<sup>30</sup> – and therefore, is disputed: See LANDAU-TASSERON, *supra* n. 7, at 170; YASSARI NADJMA, Adoption und Funktionsäquivalente im islamischen Rechtskreis, in: Hilbig-Lugani Katharina et al. (eds.), *Zwischenbilanz: Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag*, Bielefeld 2015, 1059-1071, at 1060 ff.

<sup>31</sup> See DUCA RITA, Diffusion of Islamic Law in the UK: The Case of the 'Special Guardianship', in: Farran Sue et al. (eds.), *The Diffusion of Law: The Movement of Laws and Norms around the World*, Oxon/New York 2016, at 47 ff., 50 f. with further references.

<sup>32</sup> See MATTSON, *supra* n. 24, at 1; Quran (4:5). There are other Quranic verses and *ahādīth* (sing. *hādīth*) which are considered to support this belief: see the references in AL-AZHARY, *supra* n. 18, at 51 and SAYED MOSA, The Kafalah of Islamic Law – How to Approach it in the West, in: Maunsbach Ulf et al. (eds.), *Essays in Honour of Michael Bogdan*, Lund 2013, 507-520, at 510.

<sup>33</sup> See LANDAU-TASSERON, 169; AL-AZHARY, *supra* n. 18, at 48, 52.

<sup>34</sup> See LANDAU-TASSERON, *supra* n. 7, at 169; SAYED, *supra* n. 32, at 509.

<sup>35</sup> Cf. LANDAU-TASSERON, *supra* n. 7, at 169; POLLACK et al., *supra* n. 7, at 733 f.

<sup>36</sup> See e.g. BARRAUD, *supra* n. 25, at 134.

## 2. Contemporary Perspective

Referring to the outlined textual evidence, Muslim legal scholars agreed generally<sup>37</sup> and without delay that creating a new legal and permanent parent-child relationship by terminating existing legal bonds through adoption is not permissible in Islam. “Artificial” filial bonds were viewed as non-compliant within a system that puts an emphasis on clear bloodlines as an integral part of traditional patriarchal societies. Filial relationships created without procreation could furthermore confound the idea of family as a quasi-divine institution. It was also feared that lineages might be mixed by procreation between members of the adoptive family and the adoptee.<sup>38</sup>

In most of today’s Muslim-majority countries, the legal institution of adoption is absent or banned.<sup>39</sup> Some countries accept adoptions only for certain persons, notably non-Muslims. For example, in countries where different sets of laws exist for different creeds, Christian families may adopt children from Christian orphanages.<sup>40</sup> However, the ban on adoption does not imply that children deprived of family are left without care. Children are often cared for in informal ways. Indeed, the only legal alternative to adoption is the fostering of children inspired by the traditional concept of *kafalah*.

## 3. Informal Alternatives to Adoption

Various verses in the Quran address the issue of orphans and the duties and proper conduct of the believer towards those children.<sup>41</sup> According to these texts, orphans should not be mistreated or cheated, but be treated fairly, kindly and generously.<sup>42</sup> The holy book of Islam encourages the charitable upbringing of orphans and describes God as their ultimate caregiver.<sup>43</sup> According to Islamic tradition, the Prophet Muhammad, who was an orphan himself (he had lost his father), asked believers to provide for orphans, irrespective of whether related to them or not.<sup>44</sup>

In Islamic jurisprudence, a foundling is considered a fellow Muslim and as such a holder of the same rights and bearer of the same duties as others.<sup>45</sup> The classical *fiqh* books (the books of Islamic jurisprudence) discuss extensively his or her rights as well as the duties and the proper conduct of

<sup>37</sup> It is important to mention that there are scholars who do not fully agree that adoption in the modern sense does necessarily conflict with Islamic teachings: PEARL DAVID, *Textbook on Muslim Family Law*, Croom Helm 1987, at 91; SAYED, *supra* n. 32, at 511.

<sup>38</sup> The rationale behind this is the fact that sexual relations with adopted family members are not religiously forbidden (an adopted non-biological child would not be seen as *mahram* – i.e. non-marriageable). See CLARKE, *supra* n. 3, at 72 f.; BARGACH JAMILA, *Orphans of Islam: Family, Abandonment, and Secret Adoption*, ISIM Newsletter, no. 11 (2002), 18, at 18; idem, *supra* n. 5, at 75 ff; PEARL/MENSKI, *supra* n. 7, at 408.

<sup>39</sup> NASIR, *supra* n. 5, at 153 f. Exceptions from this rule are Tunisia and Turkey.

<sup>40</sup> E.g. in Lebanon. For Indonesia, see LEWENTON URSULA, *Indonesien*, in: Bergmann Alexander et al., *Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht*, Loseblattsammlung, Ordner VII, 6. Auflage, Frankfurt a.M./Berlin 1983 ff. (Stand 2018), at 43ff.

<sup>41</sup> See e.g. SAYED, *supra* n. 32, at 512.

<sup>42</sup> AL-AZHARY, *supra* n. 18, at 55. – An example is Quran (4:36): “[...] And do good – To parents, kinsfolk, orphans, those in need [...]”. See also e.g. Quran (4:127); (93:9); (107:1-3).

<sup>43</sup> See Quran (93:6).

<sup>44</sup> MATTSON, *supra* n. 24, at 1; AL-AZHARY, *supra* n. 18, at 54 f.; SAYED, *supra* n. 32, at 513; THOMASON LAURA M., *On the Steps of the Mosque: The Legal Rights of Non-Marital Children in Egypt*, *Hastings Women’s Law Journal* Vol. 19 (2008), 121-148, at 139.

<sup>45</sup> This position is based on the notion that it is piety that characterizes a Muslim and not her or his lineage (*nasab*) or wealth (*hasab*). See BARGACH, *supra* n. 5, at 62; idem, *supra* n. 38, at 18; CLARKE, *supra* n. 3, at 77. See also Quran (6:164): “Each soul draws the meed of its acts on none but itself: no bearer of burdens can bear the burden of another.”

the finder of such a child.<sup>46</sup> In these texts, the finder of an abandoned child has the individual duty to care for the baby if the child is at risk of dying or the person voluntarily took custody of the baby. Otherwise, taking care of a foundling is considered to be a communal responsibility and the non-fulfilment of this religious duty a communal sin.<sup>47</sup>

In reality though, people often shy away from taking in an orphan because he or she could be perceived as being a “fruit of sin”.<sup>48</sup> Traditionally, not all orphans are considered “equal”. There is a distinction between a child who has lost one or both parents (*yatīm*) and the foundling (*laqīt* – the root word of this term means something that is “picked up”<sup>49</sup>) who is a child of unknown parentage.<sup>50</sup> Those with unknown origin are often equated to an illegitimate child, a *walad zinā*, and carry the stigma of a suspected immoral act by their birth-parents.<sup>51</sup> As a result, they often face a lifetime of marginalization and discrimination as well as difficulties in finding a marriage partner or a job and additionally, a lack of familial financial support or protection.<sup>52</sup> From a religious point of view however, the fostering of a child in need is considered to be a sign of piety.<sup>53</sup> Nevertheless, the establishment of “fictive” descent or kinship is not possible.

Since the care for abandoned or orphaned children was not institutionalised in historical times, the taking in of orphans was quite common.<sup>54</sup> The first so-called orphanages in the medieval period were little more than schools where children were trained to become soldiers or state officials by the Ottomans and the Mamluks.<sup>55</sup> In the case of the Mamluks, the relationships between the masters and their recruits often closely resembled adoption as the child was integrated into the household and would form close ties to his foster family.<sup>56</sup>

<sup>46</sup> See BARGACH, *supra* n. 5, at 61; AL-AZHARY, *supra* n. 18, at 52, 57, referring to the original definition of *luqta* as “that which is picked up”.

<sup>47</sup> Cf. POLLACK et al., *supra* n. 7, at 736; NASIR, *supra* n. 11, at 178 f.; idem, *supra* n. 5, at 155; BARGACH, *supra* n. 5, at 61.

<sup>48</sup> See LISTON MARGARET, From Laws to Last Names: Examining Popular Opinions of Adoption in Morocco, Independent Study Project (ISP) Collection, paper no. 2063 (2015), at 9; BREUNING MARIJKE/ISHIYAMA JOHN, The Politics of Intercountry Adoption: Explaining Variation in the Legal Requirements of Sub-Saharan African Countries, Perspectives on Politics, Vol. 7 (2009), at 96; The National, 19 September 2012: „Homes hard to find in UAE for abandoned baby boys“, available at <<http://www.thenational.ae/news/uae-news/homes-hard-to-find-in-uae-for-abandoned-baby-boys>>, accessed 01 June 2018. See also BARGACH, *supra* n. 38, at 18.

<sup>49</sup> E.g. AL-AZHARY, *supra* n. 18, at 52.

<sup>50</sup> From a “Western” perspective, an orphan is regularly a child who has lost mother or father or both parents, either because they died or have abandoned the child permanently. Today, various definitions are used by states and international institutions for defining whether a child is an orphan. The United Nations Children Fund (UNICEF) labels any child that has lost at least one parent as an orphan, irrespective of the way he or she was conceived. See <[http://www.unicef.org/media/media\\_45279.html](http://www.unicef.org/media/media_45279.html)>, accessed 01 June 2018.

<sup>51</sup> See AL-AZHARY, *supra* n. 18, at 52; CLARKE, *supra* n. 3, at 76 ff.; BARGACH, *supra* n. 38, at 18; also critical of the “blame” transferred to the child: THOMASON, *supra* n. 14, at 138.

<sup>52</sup> See Fisher, *supra* n. 22, at 4ff.; ABDUL-HAMID, *supra* n. 22, at 77, 92, 110, 137, 144, 161, 167, 190, 205; AL-AZHARY, *supra* n. 18, at 60; THOMASON, *supra* n. 14, at 143; Ahram Online, 5 April 2013: “Egyptian orphans still suffering on their National Day”, available at <<http://english.ahram.org.eg/NewsContent/1/64/68132/Egypt/Politics-/Egyptian-orphans-still-suffering-on-their-National.aspx>> accessed 01 June 2018. – Notwithstanding the fact that in legal theory, the children should not be blamed for immoral acts of their parents, but be judged on merit of their ‘*taqwa*’ (godfearing, virtue).

<sup>53</sup> MATTSON, *supra* n. 24, at 1; SAYED, *supra* n. 32, at 513.

<sup>54</sup> AL-AZHARY, *supra* n. 18, at 58.

<sup>55</sup> Idem, referring to GOITEIN SHLOMO DOV, A Mediterranean Society, in The Family, Vol. 3, Berkeley 1978, 302-311, at 304.

<sup>56</sup> AL-AZHARY, *supra* n. 18, at 58 f.

With the raise of modern nation states, governments assumed social responsibilities and functions and the establishment of orphanages became quite common.<sup>57</sup> Some of today's orphanages are run by the state and some are supervised by the state, but run on a private initiative, such as religious foundations, individuals or the community.<sup>58</sup> In some cases, orphanages do not only care for children with no known family, but also act as a social institution which cares for children whose parents are in a difficult social situation.<sup>59</sup>

There have always been orphans but also families who cannot conceive naturally. They could neither expand their family tree nor shed love on a child and ensure her or his well-being.<sup>60</sup> It should not come as a surprise that so-called "informal adoptions" were and are practiced in various "culturally sanctioned forms";<sup>61</sup> sometimes by using *hilah shar'iyah* (legal ruse).<sup>62</sup> For example, a man may claim an infant of unknown provenance (who is not the offspring of unlawful intercourse) as his legitimate child, provided that there is no evidence to the contrary (acknowledgment – *iqrār*).<sup>63</sup> As long as the formal elements of the claim are intact, the child will be considered the biological son or daughter of the claimant and acquire all concomitant rights and duties.<sup>64</sup> Furthermore, a man may claim a child was the legitimate offspring of a former marriage that has previously not been registered under the man's name.<sup>65</sup> A child may also be adopted secretly by aspiring parents who take in an abandoned baby and then raise him or her as their own child by pretending to have given birth without informing the authorities.<sup>66</sup>

It also happens that related persons exchange children. Especially in the Maghreb, such family or customary adoptions are widespread.<sup>67</sup> <sup>68</sup> In Moroccan Arabic this form of "adoption" is called *trebi*. Such adoptions take place quite informally by extended family members or close acquaintances taking in and caring for a child that is biologically not their own. For example, a child may be entrusted to a family without children or with only boys or only girls through an informal transaction without legal procedure.<sup>69</sup> The ties between an "adopted" child and her or his biological family are usually not ruptured; the child keeps her or his last name as well as the inheritance rights. *Trebi* can be seen as an infinite visit where guardianship is transferred to the host family. Even

<sup>57</sup> Regarding the evolution of institutional care for orphans in Egypt, see RUGH ANDREA B., Orphanages in Egypt: Contradiction or Affirmation in a Family-Oriented Society, in: Warnock Fernea Elizabeth (ed.), Children in the Muslim Middle East, Austin 1995, 124-141, at 130 ff.

<sup>58</sup> See AL-AZHARY, *supra* n. 18, at 59.

<sup>59</sup> AL-AZHARY, *supra* n. 18, at 60; see also RUGH, *supra* n. 57, at 124, 126 f.; CLARKE, *supra* n. 3, at 75.

<sup>60</sup> For an insight into the shift in the value of a child over time see BARGACH, *supra* n. 5, at 163 ff.

<sup>61</sup> BARGACH, *supra* n. 5, at 27.

<sup>62</sup> See LANDAU-TASSERON, *supra* n. 7, at 187, with historical evidence.

<sup>63</sup> CLARKE, *supra* n. 3, at 80 ff. On *iqrār*, see KHAN/KHAN, *supra* n. 10, at 210; NASIR, *supra* n. 5, at 150 ff.; see also YASSARI, *supra* n. 30, at 1062.

<sup>64</sup> LANDAU-TASSERON, *supra* n. 7, at 172f.; CLARKE, *supra* n. 3, at 80 f.; SUJIMON, *supra* n. 17, at 372 f.

<sup>65</sup> CLARKE, *supra* n. 3, at 80.

<sup>66</sup> AL-AZHARY, *supra* n. 18, at 60 f.; BARGACH, *supra* n. 5, at 27 f.

<sup>67</sup> See e.g. BARRAUD ÉMILIE, Kafâla transnationale: Modalités de formation des familles kafalates de France, Autrepart, no 57-58 (2011/1), 247-261, at 249.

<sup>68</sup> BARRAUD ÉMILIE, Adoption et kafalah dans l'espace migratoire franco-maghrébien, L'Année du Maghreb 2008, no. IV (2008), 471-489, at 275 f.

<sup>69</sup> See *idem* at 249, 253; BARRAUD, *supra* n. 25, at 136.

though the host family will not incorporate the child legally, emotional ties between the host parents, siblings and the entrusted child will most likely develop quite naturally.<sup>70</sup>

Another form of “alternative adoption” is the creation of milk kinship (*ridāʾ*), a relationship with special rights under Islamic law.<sup>71</sup> The child nursed by the foster mother will be regarded as the milk-sibling of the wet nurse’s biological children. In this case, the child may still not inherit from her foster parents, but it is barred from marrying any of the mother’s biological children.<sup>72</sup> In some countries, the nursing of small foster children (younger than two years old) is encouraged by the authorities in order to prevent issues with religious prescriptions, such as the veiling of female family members when the – biologically unrelated – foster child gets older.<sup>73</sup> Milk kinship may create a basis for co-operation and solidarity between unrelated people, but has otherwise no legal consequences.<sup>74</sup>

## IV. The Fostering of Children (*Kafalah*) in Classical and Modern Islamic Law

### 1. In General

*Kafalah*, which derives from the Arabic root verb of ka-fa-la, meaning “to take care”, or *ḍamān*, “to guarantee”,<sup>75</sup> is the Islamic equivalent to “Western” adoption. This legal institute, rooted in the law of contract and obligations rather than in family law,<sup>76</sup> is based upon the traditional understandings that oppose fictive filiation and encourage fostering of abandoned or orphaned children.<sup>77</sup>

*Kafalah* is usually described as a form of legal guardianship or tutelage that aims at creating a permanent arrangement for a child deprived of a family environment. Basically, two kinds of *kafalah* exist: a consensual *kafalah*, which shall only be addressed in passing here, whereby a *kafalah* arrangement is made between two private parties, and a legally binding contract between state authorities as wardens of an abandoned child and a family or single person.<sup>78</sup> The latter kind shall be the focus of this paper.

Unlike in legal parenthood, there are no mutual rights and duties in a *kafalah* arrangement. The so-called *kafil* makes a commitment by contract, usually in front of a notary or judge to maintain, guard and educate the *makfoul* (child taken into *kafalah*) in the same way, as they would do for a biological

<sup>70</sup> BARGACH, *supra* n. 5, at 27.

<sup>71</sup> NASIR, *supra* n. 5, at 63 f.; BAKHTIAR, *supra* n. 10, at 419; see also e.g. Art. 114 (2) UAE Personal Status Law.

<sup>72</sup> AZ-ZUBAIR, *supra* n. 6, at 608.

<sup>73</sup> See The National, 19 September 2013: „Homes hard to find in UAE for abandoned baby boys“, available at <<http://www.thenational.ae/news/uae-news/homes-hard-to-find-in-uae-for-abandoned-baby-boys>> accessed 01 June 2018.

<sup>74</sup> LANDAU-TASSERON, *supra* n. 7, at 188.

<sup>75</sup> BARRAUD, *supra* n. 67, at 248; BARGACH, *supra* n. 5, at 29. In its other meaning, *kafālah* serves as a kind of sponsorship system used in the context of migrant labourers mainly – but not exclusively – in the Gulf countries.

<sup>76</sup> BARGACH, *supra* n. 5, at 29 f., 42, 177; see also WELCHMAN, *supra* n. 2, at 148.

<sup>77</sup> BARRAUD, *supra* n. 25, at 133; *idem*, *supra* n. 67, at 247; LE BOURSICOT MARIE-CHRISTINE, La Kafāla ou recueil légal des mineurs en droit musulman : une adoption sans filiation, *Droit et cultures*, no. 59 (2010), 283-302, marginal no. 1-5.; SAYED, *supra* n. 32, at 51.

<sup>78</sup> In more detail, see BARGACH, *supra* n. 5, at 28.



child.<sup>79</sup> A feature of this commitment is its quasi-definitive nature or permanence by which the *kafil* usually commits to support the *makfoul* until his or her legal maturity. But due to the contractual nature of the relationship, the legal, moral, educational, and financial duties towards the child may vary.<sup>80</sup> The feelings, however, can be equally strong as in biological child-parent relationships, which is expressed in the way caretakers speak of their wards, namely as “adopted children”.<sup>81</sup>

In contrast to adoption in Western systems, *kafalah* does not establish a legal parent-child relationship between the *kafil* and the *makfoul* and it does not end the legal relationship between the legitimate parents and the child.<sup>82</sup> Hence, core rights or privileges of *nasab*, such as family name and proportionate inheritance entitlements usually do not accrue to the minor taken into *kafalah*.<sup>83</sup> However, the person taking in a minor under *kafalah* is indeed free to assign certain portions of their assets to the *makfoul* since the Quran encourages Muslims to leave part of their wealth to those who are dependent on them.<sup>84</sup> In practice, bequests often tend to attenuate the inequality between biological children and minors taken in under *kafalah* as well as providing a form of social security for such children.<sup>85</sup> Therefore, from a functional point of view, *kafalah* appears to be close to adoption; from a legal perspective it has similarities to foster care. Its structure and historical as well as socio-cultural background make it an institution in its own right.

The laws of certain Muslim majority countries regulate forms of traditional *kafalah* as a means of child protection.<sup>86</sup> The details of how this is operated in practice, especially its modalities and procedures, largely depend on the laws of the respective states. Common features are the *kafil*'s religion (usually he or she must be a Muslim) and his or her mental, financial and personal suitability

<sup>79</sup> See e.g. SAYED, *supra* n. 32, at 513; Fact Sheet No. 50, Specific case Kafalah, International Social Service, International Reference Service for the Rights of Children Deprived of their Family.

<sup>80</sup> BARRAUD, *supra* n. 67, at 248; DUCA, *supra* n. 31, at 52. However, because it is based on a contractual agreement, the *kafil* may only owe a select number of moral, educational, financial and other duties towards the child taken into *kafalah*: BARGACH, *supra* n. 5, at 29.

<sup>81</sup> See e.g. Al Jazeera, 6 March 2015: “Adopting Orphans Breaking Taboos in Dubai”, available at <<http://www.aljazeera.com/news/2015/03/adopting-orphans-breaking-taboos-dubai-150302080741099.html>> accessed 01 June 2018. – But, as everywhere, there are other realities as well. In Morocco namely, notarial *kafalah* arrangements, especially regarding minor girls, sometimes have another function that does not serve the child's best interest at all: children taken into *kafalah* must serve as domestic helps, traditionally called “petites bonnes”. Often, those children are subject to sexual exploitation and abuse. BARRAUD, *supra* n. 25, at 137 f., states that the (single) mothers of these children had frequently been “petit bonnes” themselves.

<sup>82</sup> Either fully or in part: SAYED, *supra* n. 32, at 509.

<sup>83</sup> BARRAUD, *supra* n. 67, at 248; BARRAUD, *supra* n. 25, at 134; BARGACH, *supra* n. 5, at 28.

<sup>84</sup> Cf. AL-AZHARY, *supra* n. 18, at 50; ARSHAD RAFFIA, *Islamic Family Law*, London 2010, at 177 f., 187. – According to Islamic jurisprudence (*fiqh*) – both Sunni and Shia – a person may bequeath a maximum of one-third of their estate to an unrelated person or give it to them as a gift. See POWERS DAVID STEPHAN, *The Development of Islamic Law and Society in the Maghrib: Qādīs, Muftīs and Family Law*, Farnham 2011, at 12; MOUSSA REZIG, *Les Aspirations Conflictuelles du Droit de L'Adoption: Études Comparative*, Arab Law Quarterly, Vol. 19 (2004), 147-168, at 155; BARRAUD, *supra* n. 67, at 248.

<sup>85</sup> See HASHEMI KAMRAN, *Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation*, Human Rights Quarterly, Vol. 29 (2007), 194-227, 220f.; ASSIM USANG M./SLOTH-NIELSEN JULIA, *Islamic Kafalah as an Alternative Care Option for Children Deprived of a Family Environment*, African Human Rights Law Journal, Vol. 14 (2014), 322-345, at 330.

<sup>86</sup> *Kafalah* is also recognised as an alternative method of care for children deprived of parental care in a number of international treaties and regional instruments, namely: The United Nations Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, the 1996 Hague Child Protection Convention (but not in the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption), as well as certain regional instruments such as the African Charter on the Rights and Welfare of the Child, adopted by the Organisation of African Unity in 1990 (entered into force in 1999), and the European Convention on Human Rights (entered into force in 1993).

to this role as well as the child's status as "abandoned". In the following paragraphs, we will have a brief look into the *kafalah* or fostering-regulations of three countries with a different legal-historical background, namely Morocco, Egypt and the United Arab Emirates.<sup>87</sup> Due to the constraints of this article, the focus will be on some central aspects of the relevant laws rather than an in-depth study of the legal situation.

## 2. *Kafalah* in Morocco, Egypt and the United Arab Emirates

### a) *Morocco*

The Kingdom of Morocco is a constitutional monarchy in the Maghreb region of North Africa. The religious affiliation of the country is predominantly Muslim with a Christian and Jewish minority. The Moroccan legal system is a mixed system of civil law based on French law and Islamic law. The Constitution of Morocco describes the State as a constitutional, democratic, parliamentary and social monarchy, as well as "an Islamic sovereign state" and accords Islam the status of state religion.<sup>88</sup> The majority of Moroccans are Sunnites.<sup>89</sup>

### aa) *Family Law and Lineage*

Until the late fifties, the law applied in family matters were the rules of classical Islamic law based on dominant Maliki doctrines. Since then, traditional family law issues including marriage, divorce, child custody and maintenance as well as inheritance are governed by the Code of Personal Status, also known as *Moudawanat al-usra*, or *Moudawana* (as it will be called hereinafter). The Moudawana was last revised in 2004 and is based on Islamic law.<sup>90</sup> The law is in principle applicable to all Moroccans irrespective of faith; the Jewish citizens apply their own laws.<sup>91</sup>

For Muslims, the laws of Morocco retain the principle that *nasab* is tied to legitimate birth. Paternity is assumed when a child is born in wedlock.<sup>92</sup> *Nasab*, or paternity, "is a legitimate bond between the father and the child that is transmitted through the generations."<sup>93</sup> The Moudawana enumerates

<sup>87</sup> For Algeria, see LE BOURSIOT, *supra* n. 76, marginal no. 29 ff.; BETTAHAR YAMINA, La construction sociale de la parentalité: L'exemple de l'Algérie, L'Année du Maghreb II (2005-2006), 155-170; CHABIB-ZIDANI FARIDA, L'enfant né hors mariage en Algérie, Alger 1992.

<sup>88</sup> See Dahir no. 1-11-91 du 27 chaabane 1432 (29 juillet 2011) portant promulgation du texte de la constitution, available at <[http://www.maroc.ma/en/system/files/documents\\_page/bo\\_5964bis\\_fr\\_3.pdf](http://www.maroc.ma/en/system/files/documents_page/bo_5964bis_fr_3.pdf)> accessed 01 June 2018, Preamble para. 2, Art. 1 para. 1 and Art. 3.

<sup>89</sup> The World Factbook, CIA, Morocco, available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html>> accessed 01 June 2018.

<sup>90</sup> Dahir no. 1-04-22 du 12 hija 1424 (3 février 2004) portant promulgation de la Loi no. 70-03 portant Code de la famille. The official Arabic text was published in the Bulletin Officiel (édition générale) no. 5184 du 14 hija 1424 (5 février 2004), 418ff. The French version was published in the Bulletin Officiel no. 5358 du 2 ramadan 1426 (6 octobre 2005), 667 ff. Royaume de Maroc, Ministère de Justice, Traduction en Français du Code de la famille, Version non officielle, available at <<http://adala.justice.gov.ma/production/legislation/fr/civil/Code%20de%20la%20famille%20Maroc%20Texte.htm>> accessed 01 June 2018.

<sup>91</sup> Art. 2 No. 1 and No. 4 para. 2 Moudawana.

<sup>92</sup> Art. 152-154 Moudawana.

<sup>93</sup> Art. 150 Moudawana.

three alternatives to establish legitimate male filiation: the conjugal bed, acknowledgment or sexual intercourse by error.<sup>94</sup>

The conjugal bed is considered to be an irrefutable proof of paternity. It is proven by the same means that is used to prove the marital relationship.<sup>95</sup> If the conjugal bed meets these requirements, the husband can only contest paternity through a sworn allegation of adultery committed by his spouse or by means of an irrefutable expertise upon two conditions: First, the husband must present solid proof of his allegations; and second, the issuance of a judicial decision ordering the expertise.<sup>96</sup> The child rendered illegitimate by court order or by birth does not have any rights vis-à-vis her or his father.<sup>97</sup> Because this creates great hardship, several methods are considered to be an acceptable proof of paternity: the conjugal bed, the father's acknowledgement, the testimony of two public notaries, oral testimony and by all other legal means, including judicial expertise.<sup>98</sup>

According to Article 147(1), the three alternatives to establish legitimate filiation to the mother are birth, acknowledgment, and judicial decision. In its second paragraph, the Article adds that maternal filiation is legitimate in cases of marriage, sexual relations by error and rape. Moreover, it states that filiation to the mother has the same effect whether the child is the offspring of a legitimate or an illegitimate relationship.<sup>99</sup> Thus, in contrast to the articles regulating legitimate filiation to the father, the relevancy of the subcategory in the Moudawana regarding legitimate maternal filiation remains unclear.<sup>100</sup>

The Moroccan family law states that adoption has no legal value and does not produce any of the effects of legal filiation.<sup>101</sup> Children without parental care can be taken into *kafalah* instead.<sup>102</sup>

#### *ab) The Fosterage of Abandoned Children*

### **In General**

In 2013, the Ministry of Justice reported that Morocco was dealing with a staggering number of 5,377 cases of abandoned children, or nearly 15 per day.<sup>103</sup> Various reasons explain this figure. Mothers who give birth out of wedlock are often considered to be a shame for their families, since family honour bases on the marriageability, which in turn depends on the virginity of daughters.<sup>104</sup> Often, these women are poor, homeless, sex workers or maids who are already socially discriminated.<sup>105</sup>

<sup>94</sup> Art. 152 Moudawana.

<sup>95</sup> See Art. 10 ff. Moudawana, Art. 16 Moudawana.

<sup>96</sup> See Art. 153, 159 Moudawana.

<sup>97</sup> Art. 148 Moudawana.

<sup>98</sup> Art. 158 Moudawana.

<sup>99</sup> Art. 146 Moudawana.

<sup>100</sup> KREUTZBERGER, *supra* n. 6, at 63.

<sup>101</sup> Art. 149 Moudawana.

<sup>102</sup> For a short history of the legal *kafalah* in Morocco and Algeria see BARRAUD, *supra* n. 25, at 134 f.

<sup>103</sup> See "Morocco: Every day almost 15 children are being abandoned", available at <<http://en.protothema.gr/morocco-every-day-almost-15-children-are-being-abandoned/>> accessed 01 June 2018.

<sup>104</sup> SAYED, *supra* n. 32, at 514.

<sup>105</sup> See the profiles of single mothers described in BARGACH, *supra* n. 5, at 15, 133.

Children born outside of marriage are socially heavily stigmatised as they are considered being “unworthy” and children of sin with the concomitant social rejection and marginalisation.<sup>106</sup> In addition, mothers run the risk of being the subject of criminal prosecution, because childbirth is the visible proof for an extramarital sexual relationship. Morocco does not apply the classical penalties for *zinā*, but extramarital sex remains a crime punishable by a prison sentence of one month to one year (unmarried people) and one to two years (adultery).<sup>107</sup>

### Prerequisites

The Moroccan law on *kafalah* came into force in 1993 and was last revised in 2002.<sup>108</sup> According to the legal text, abandoned children are registered by the public prosecutor (Royal Prosecutor). They are given a fictive first name and surname as well as a fictive filiation by adding a mother’s and father’s first names.<sup>109</sup> Until *kafalah* is established, abandoned infants are placed in state or private run orphanages or are given into the custody of a foster family.<sup>110</sup>

In order to place a child into a family under *kafalah*, the first administrative measure that needs to be undertaken is the legal establishment of the child as being abandoned.<sup>111</sup> According to the law, an “abandoned child” means anyone below the age of eighteen who is abandoned, orphaned or with parents who are incapable of exercising their parenthood.<sup>112</sup> The Royal Prosecutor shall request the declaration of abandonment on his own initiative or at the request of a third party. The competent judge starts an investigation into finding the child’s parents. If it is proven that the child falls within one of the situations provided for in the first article of the law, he shall declare by judgment that the child is abandoned.<sup>113</sup> An abandoned child is under the guardianship of the Minors judge affiliated with the competent court.<sup>114</sup>

The proceedings start with an application to the competent judge at the place of residence of the abandoned infant by the party requesting to take the child into *kafalah*. The party must supply the judge with a copy of the birth certificate of the abandoned child as well as documents proving that they fulfil the following conditions:<sup>115</sup>

The person or persons intending to take a minor into *kafalah* can be a Muslim couple or a Muslim single woman.<sup>116</sup> In addition, the applicants must have full legal capacity, as well as the social and moral capability to exercise guardianship over the child. They must have sufficient means to support the child financially; be free of contagious diseases or diseases that render them incapable to

<sup>106</sup> SAYED, *supra* n. 32, at 514.

<sup>107</sup> Art. 490-491 Moroccan Penal Code.

<sup>108</sup> Dahir no. 1-02-172 du 1 rabii II 1423 (13 juin 2002) portant promulgation de la Loi no. 15-01, relating to *kafalah* of abandoned minors (Moroccan Kafalah Law).

<sup>109</sup> BARRAUD, *supra* n. 67, at 248; BARRAUD, *supra* n. 25, at 135. Loi 15-1 relative à la prise en charge des enfants abandonnés promulguée par le dahir no. 1-02-172 du 13 juin 2002.

<sup>110</sup> KREUTZBERGER, *supra* n. 6, at 66; BARGACH, *supra* n. 5, at 3 f., 195 ff., 204.

<sup>111</sup> Art. 3-7 Moroccan Kafalah Law.

<sup>112</sup> Art. 1 Moroccan Kafalah Law.

<sup>113</sup> Art. 2-4 Moroccan Kafalah Law.

<sup>114</sup> Art. 7 para. 2 Moroccan Kafalah Law; SAYED, *supra* n. 32, at 515.

<sup>115</sup> Art. 14 f., 9 Moroccan Kafalah Law.

<sup>116</sup> Interestingly, in Tunisia where plain adoption is permitted the Muslim faith is not a prerequisite for adoption. See YASSARI, *supra* n. 30, at 1063.

undertake their responsibility; they should neither be in a legal battle with the child whom they request to take into *kafalah* or with her or his parents; and lastly, there should be no family dispute in existence raising concerns regarding the best interests of the child.<sup>117</sup>

The role of the *kafil* can also be assumed by charitable organisations and institutions with sufficient financial and organisational means to protect, to educate the child, and to raise it according to the precepts of Islam.<sup>118</sup>

Until recently, international *kafalah* placements in favour of nationals living abroad or in favour of foreigners were practiced as long as the applicants would respect the procedural conditions (e.g. the conversion to Islam). On 21 September 2012, Justice Minister El Mostapha Ramid published a notice that appears to indicate that the right to *kafalah* should only be granted to Muslim families who reside in Morocco.<sup>119</sup>

If the before-mentioned prerequisites are met, the judge assisted by a commission investigates the specific case especially by assessing the suitability of the applicants to exercise *kafalah*. Before a decision is taken, the child over twelve years old must give his or her personal consent, except in cases where the applicant is a legal entity rather than a natural person.<sup>120</sup> If more than one party applies to take the *kafalah* of a child, spouses without children or those who are deemed particularly suitable to serve the child's interests will be given preference.<sup>121</sup>

If the applicants are deemed suitable, the judge makes a ruling providing them with the right of *kafalah*. The decision will be executed within 15 days from the court ruling.<sup>122</sup>

### Effects of the Decision

The party (a person or an institution) given the right to *kafalah* is appointed legal guardian of the child by the aforementioned court ruling. The *kafalah* parents have to respect the best interest of the child, which is one of the central concerns of the law and reiterated in numerous passages.<sup>123</sup> In particular, the *kafalah* parents have the responsibility to take care of the child, as well as guaranteeing custody of the child up to legal maturity.<sup>124</sup> This means that the *kafalah* parents have to make sure that the child grows up in a healthy environment catering to his or her physical and psychological needs and that he or she is given an education.<sup>125</sup>

<sup>117</sup> Art. 9 No. 1 and 2 Moroccan Kafalah Law.

<sup>118</sup> Art. 9 No. 3 Moroccan Kafalah Law.

<sup>119</sup> See Bundesamt für Justiz (BJ), Adoption Marokko, available at <<https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/herkunftslaender/marokko.html>> accessed 01 June 2018. However, according to the text of the law, a departure from Morocco of the person/persons undertaking the *kafalah* is possible subject to the authorisation of the competent Minors Judge (Art. 24 Moroccan Kafalah Law).

<sup>120</sup> Art. 12, 16 Moroccan Kafalah Law.

<sup>121</sup> Art. 10 Moroccan Kafalah Law.

<sup>122</sup> Art. 17 f. Moroccan Kafalah Law.

<sup>123</sup> E.g. Art. 25 Moroccan Kafalah Law: Cancellation of the *kafalah* by court decision if required by the best interest of the child. – The Moroccan Kafalah law thus aligns to the United Nations Convention on the Rights of the Child (UN-CRC), which states in its Art. 3 that “in all actions concerning children (...) the best interests of the child shall be a primary consideration”.

<sup>124</sup> Art. 2 Moroccan Kafalah Law; Art. 166 Moudawana. According to Art. 209 Moudawana, the age of legal maturity is 18 Gregorian years.

<sup>125</sup> Sadly though, in some cases children and particularly girls, are “used” as cheap labour through the act of *kafalah*. Arguably, this is one reason why the orphanages are full of boys only. See BARRAUD, *supra* n. 21, at 157 f.; LISTON, *supra* n. 48, at 10.



The law stipulates that the *kafalah* parents are to take care of the child in the same way as if the child were their biological offspring according to the relevant rules in the Moudawana concerning guardianship and maintenance.<sup>126</sup> Therefore, in case of a girl, maintenance continues until her marriage or until she is able to finance her own livelihood. If the child is handicapped or unable to meet her or his own needs, the maintenance obligation continues to exist after legal maturity.<sup>127</sup> In any case, neither *nasab* nor inheritance rights are established.<sup>128</sup> Because the legal ties to the biological parents are not ruptured by *kafalah*, the child maintains the inheritance rights in his or her birth-parents' estate.<sup>129</sup> In principle, the *kafalah* does not have any effect on the child's name. However, it seems possible that the *kafil*'s name may be attributed to the fostered child if authorised by an official decree.<sup>130</sup>

The *kafalah* parents intending to endow the child or make inheritance dispositions in her or his favour must do this under the supervision of the competent judge at the place of residence of the child taken into *kafalah*.<sup>131</sup> As already mentioned, according to Islamic jurisprudence (*fiqh*) – both Sunni and Shia – a person may bequeath a maximum of one-third of their estate to an unrelated person. Gratification (*jaza*) or testamentary adoption (*tazil*) provided for by the Moudawana may accord the child the position of an heir of the first rank but does not prove legal filiation. These types of adoption are governed by testamentary rules.<sup>132</sup>

### Termination of Placement

The *kafalah* placement comes to an end when the child reaches the age of legal maturity<sup>133</sup> if the child or his *kafalah* parents or *kafalah* mother die, or if the *kafalah* parents or the *kafalah* mother become legally incapacitated. Furthermore, the *kafalah* placement is revoked if the *kafalah* parents fail to provide for the child in accordance with the rules foreseen by the *kafalah* law or do not perform the *kafalah*. The judge may also terminate the *kafalah* placement if the best interests of the child so necessitate.<sup>134</sup> Divorce of the *kafalah* parents may also terminate the *kafalah* placement. However, upon application from the *kafalah* father or mother, or an official acting in the public interest or ex officio, the judge may – by again assessing the suitability of the applicant – decree the continuation of

<sup>126</sup> Art. 2, 22 Moroccan Kafalah Law; Art. 163 ff., 187 ff. Moudawana.

<sup>127</sup> Art. 22 Moroccan Kafalah Law; Art. 198 para. 2 and 3 Moudawana. The *kafil* benefits from social benefits and allowances dedicated to parents with children. Also, the *kafil* is liable for the acts of his or her "adoptive" children: Art. 22 Moroccan Kafalah Law.

<sup>128</sup> Art. 2 Moroccan Kafalah Law.

<sup>129</sup> ISHAQUE SHABNAM, Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to Identity, *International Journal of Law, Policy and the Family*, Vol. 22 (2008), 393-420, at 407.

<sup>130</sup> See Art. 20, Loi no. 37-99 relative à l'état civil; Dahir no. 1.02-239 du 3 octobre 2002; Further: FORTIER, *supra* n. 21, at 9; BARRAUD, *supra* n. 25, at 135 f.

<sup>131</sup> Art. 23 Moroccan Kafalah Law.

<sup>132</sup> See Art. 149 para. 3 Moudawana. See also Guide Pratique du Code de Famille, 101, available at <<http://www.jafbase.fr/docMaghreb/MarocCodeFamGuidePratique.pdf>> accessed 01 June 2018.

<sup>133</sup> The *kafalah* will not end at that age for a non-married girl, a handicapped child or a young adult who is unable to support themselves financially.

<sup>134</sup> Art. 19, Art. 25 Moroccan Kafalah Law.

the *kafalah* or another measure.<sup>135</sup> At the same time, the biological parents may reclaim the child at any time if the reasons for abandonment cease to exist.<sup>136</sup>

## b) Egypt

The Arab Republic of Egypt is the most populous country in North Africa and the Arab World. The great majority of its people are adherents to Sunni Islam, with a considerable minority of Coptic Christians and other Christian denominations.<sup>137</sup> The Egyptian legal system encompasses Islamic law and a system of codified laws. Egypt's supreme law is its written constitution. According to its provisions, the principles of the Islamic Shari'a are the main source of legislation and Islam is the religion of the state.<sup>138</sup>

### ba) Family Law and Lineage

Egypt neither does have a unified personal status law that applies to all religious denominations, nor are the rules of Egyptian Muslims personal status law codified in a comprehensive code. For Muslims, matters of family are regulated by the Egyptian Personal Status laws which are informed by the dominant view of the Hanafi School of law.<sup>139</sup> The scholarship of the Hanafi School of law is also used for gap-filling purposes.<sup>140</sup>

There are quite a few substantive laws dealing with personal status. These include for instance Law No. 131 of 1948, the Egyptian Civil Code; Decree-Law No. 25 of 1920 regarding Maintenance and some Questions of Personal Status; Decree-Law No. 25 of 1929 regarding certain Personal Status Provisions; Law No. 100 of 1985 amending decree-laws No. 25 of 1920 and 1929 as well as procedural laws.<sup>141</sup> Religious minorities like the Coptic Christian population apply their own religious rules to personal status matters, provided that the parties to the dispute belong to the same faith, and that

<sup>135</sup> Art. 26 Moroccan Kafalah Law.

<sup>136</sup> Art. 29 Moroccan Kafalah Law.

<sup>137</sup> The World Factbook, CIA, available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html>> accessed 01 June 2018.

<sup>138</sup> Art. 2 of the Constitution of the Arab Republic of Egypt of 2014, unofficial English translation available at <<http://www.sis.gov.eg/Newvtr/Dustor-en001.pdf>> accessed 01 June 2018. At the same time, the constitution states that Christians and Jews have the right to follow their religious laws "regulating their personal and religious affairs". It also grants them the right to select their own religious leaders (Art. 3 Constitution).

<sup>139</sup> The personal status law has been amended several times. See FAWZY ESSAM, Personal Status Law in Egypt: A Historical Overview, in: Welchman Lynn (ed.), Women's Rights and Islamic Family Law: Perspectives on Reform, London/New York 2004, 30-44, at 30 ff.

<sup>140</sup> Judges usually refer to the unofficial codification of Qadri Pasha of 1875, wherein the rules of the Hanafi school are compiled. See EBERT HANS-GEORG/HEFNY ASSEM, Ägypten, in: Bergmann Alexander et al., Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht, Loseblattsammlung, 6. Auflage, Frankfurt a.M./Berlin 1983 ff., at 16 f.

<sup>141</sup> The law currently in force is Law No. 1 of 2000 organizing Certain Conditions and Procedures of Litigation in Matters of Personal Status (amended by Law No. 91 of 2000). Further laws include: Decree-Law No. 118 of 1952 on rules of guardianship over one-self; Decree-Law No. 119 of 1952 on rules of guardianship over money; Law No. 62 of 1976 amending certain rules concerning maintenance; Law No. 1 of 2000 regarding the Promulgation of a Law to Organize Certain Conditions and Procedures in Matters of Personal Status (mainly procedural in nature but also containing two important substantive provisions, namely no-fault divorce (*khul'*) and the right of the wife to divorce in the context of an unregistered marriage); Law No. 4 of 2005 amending Article 20 of Decree-Law No. 25 of 1920 (raising the age of custody); Law No. 126 of 2008 amending the provisions of the Child Act (No. 12 of 1996, "Child Law"): See MOUSSA JASMINE, Competing Fundamentalisms and Egyptian Women's Family Rights: International Law and the Reform of Shari'a-derived Legislation, Leiden 2011, at XIX.

<sup>142</sup> MOUSSA JASMINE, Egypt, in: Yassari Nadjma/Möller Lena-Maria/Gallala-Arndt Imen (eds.), Parental Care and the Best Interests of the Child in Muslim Countries, The Hague 2017, 1-26, at 5 f.

there are no legal provisions and court judgments which are applicable to all Egyptian citizens irrespective of their faith.<sup>143</sup>

In Egypt, the principle of *al-walad li'l-firāsh* establishes legal paternity. According to Egyptian law, courts may not hear any paternity claims if there was no physical contact between the spouses after their marriage or if a child was born more than one year after his or her father's absence or more than one year after the divorce of the parents (or the father's death).<sup>144</sup> The other means of establishing *nasab* is acknowledgement (*iqrār*). In order to prove legitimate filiation, witnesses and scientific methods may be used.<sup>145</sup> Furthermore, legitimate filiation may be proven by *al-bayina* (evidence).<sup>146</sup> Denial of paternity may arise through the procedure of *li'an*. Even though the Egyptian personal status law does not deal with the *li'an* procedure, courts hear such cases on the basis of the rules for lacunae in the relevant laws and the according Islamic schools of law's acceptance of such procedure.<sup>147</sup>

According to Egyptian laws, members of the Coptic Christian church may adopt children but Muslims may not.<sup>148</sup> However, Muslim citizens may turn to secret informal adoption, for instance through acknowledgment (*iqrār*)<sup>149</sup> or in the case of someone finding an abandoned newborn baby and raising the baby without informing the authorities.<sup>150</sup> The declaration of paternity is prohibited where one parent is in wedlock with a party other than the biological parent of the child in question.<sup>151</sup>

#### bb) The Fostering of Abandoned Children

##### In General

Children are regularly abandoned in Egypt. The causes for abandonment are numerous and diverse and include poverty, unwanted pregnancies, rape and '*urfi* (customary)<sup>152</sup> as well as *misfar*

<sup>143</sup> See SEZGIN YÜKSEL, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India*, New York 2013, at 119 ff.; TADROS MARIZ, *Egypt*, in: Kelly Sania/Breslin Julia (eds.), *Women's Rights in the Middle East and North Africa: Progress amid Resistance*, New York/Lanham, 89-120, at 95; EBERT/HEFNY, *supra* n. 140, at 15.

<sup>144</sup> Art. 15 of the Decree-law no. 25 of 1929 regarding certain Personal Status Provisions. See SHAHAM RON, *Law versus Medical Science: Competition between Legal and Biological Paternity in an Egyptian Civil Court*, *Islamic Law and Society*, Vol. 18 (2011), 219-249, at 229 f. According to Hanafi doctrine, the minimum term of pregnancy is six months.

<sup>145</sup> EBERT/HEFNY, *supra* n. 140, at 36. Regarding the scope and limits of the use of modern medical technology in paternity cases see SHABANA AYMAN, *Paternity between Law and Biology: The Reconstruction of the Islamic Law of Paternity in the Wake of DNA Testing*, *Zygon*, Vol. 47 (2012), 214-239, at 216 ff. In particular, see Art. 4 Law no. 126 of 2008 ("Child Law"): "The child shall have the right to establish his legitimate paternal and maternal lineage, using all lawful scientific means in order to establish such lineage."

<sup>146</sup> EBERT/HEFNY, *supra* n. 140, at 36.

<sup>147</sup> FAWZY, *supra* n. 139, at 41.

<sup>148</sup> The relevant rules for Coptic citizens are formulated in the Personal Status Law for the Orthodox Copts of 1938 in Art. 110-123 of the said law. For an overview, see ROWBERRY RYAN/KHALIL JOHN, *A Brief History of Coptic Personal Status Law*, *Berkeley Journal of Middle Eastern and Islamic Law*, Vol. 3 (2010), 81-139. For Muslim citizens, see Art. 4 para. 3 Child Law.

<sup>149</sup> EBERT/HEFNY, *supra* n. 140, at 36.

<sup>150</sup> AL-AZHARY SONBOL, *supra* n. 18 at 60.

<sup>151</sup> Art. 22 para. 1 No. 2 Child Law.

<sup>152</sup> An '*urfi* marriage is an unregistered marriage not celebrated by a state representative and will only produce certain legal effects.

(temporary) marriages.<sup>153</sup> According to the Children's rights group FACE, which gives assistance to street children and orphans, there are at the present officially 6500 orphans throughout 238 legally recognised institutions in Egypt. However, numbers are probably much higher as several institutions are not recognized and some operate on an illegal basis.<sup>154</sup> Furthermore, it is estimated that tens of thousands of children live on Egypt's streets, however not all of them are orphans.<sup>155</sup> Also, some of the children left in orphanages know who their parents are but often these parents are unable to care properly for the children due to poverty or a prison sentence.<sup>156</sup> Illegitimate children are often abandoned due to shame and the fear that relatives would harass the mother due to her status as a woman who committed *zinā*. Regardless of their background, orphans bear the stigma of illegitimacy and are even regarded as a "source of evil".<sup>157</sup>

According to Egyptian child law, any infant found abandoned in the streets must immediately be delivered either to the police or to an institution designated to receive new-borns which in turn will notify the police. They will record all data regarding the child and the finder.<sup>158</sup> A doctor will then estimate the age of the child, and the child receives a name. The relevant data is then included in the birth registry.<sup>159</sup> The law also provides for alternative or foster care for children without parental care.<sup>160</sup> The fostering of children is further detailed in the 'Fostering of Children Regulations'.<sup>161</sup>

In January 2015, Egypt amended its child law to lower the age when children can be raised by foster parents from two years to three months allowing non-institutional support of orphans and other children in need nearly from birth.<sup>162 163</sup>

<sup>153</sup> See e.g. MEGAHEAD HAMIDO A./CESARIO SANDRA, Family Foster Care, Kinship Networks, and Residential Care of Abandoned Infants in Egypt, *Journal of Family Social Work*, Vol. 11 (2008), 463-477, at 466 f.; THOMASON, *supra* n. 14, at 127; The Cairo Times, 25 March 2004, "Beloved outcasts", available at <[http://www.mafhoum.com/press7/187528\\_fichiers/adoption0804.htm](http://www.mafhoum.com/press7/187528_fichiers/adoption0804.htm)> accessed 01 June 2018; Arab News, 14 October 2010, "Misfar misfortune: 900 children abandoned in Egypt by Saudi fathers", available at <<http://www.arabnews.com/node/357711>> accessed 01 June 2018.

<sup>154</sup> See FACE for children in need, available at <<http://www.facechildren.org/en/Context-in-Egypt.htm>> accessed 01 July 2017.

<sup>155</sup> See <[http://www.unicef.org/egypt/protection\\_4397.html](http://www.unicef.org/egypt/protection_4397.html)> accessed 16 July 2018.

<sup>156</sup> AL-AZHARY SONBOL, *supra* n. 18, at 60.

<sup>157</sup> See e.g. idem; RUGH ANDREA B., Orphanages in Egypt: Contradiction or Affirmation in a Family-Oriented Society, in: Warnock Fernea Elizabeth, *Children in the Muslim Middle East*, Austin 1995, 124-141, at 126 f.; THOMASON, *supra* n. 14, at 131 f.; Ahram Online, 5 April 2013, "Egyptian orphans still suffering on their National Day", available at <<http://english.ahram.org.eg/NewsContent/1/64/68132/Egypt/Politics-/Egyptian-orphans-still-suffering-on-their-National.aspx>> accessed 01 June 2018.

<sup>158</sup> However, this person may lawfully choose not to give her or his details to the police. In case of known parents, there are instances where their names will not be included in the child's records, notwithstanding their personal wishes: See Art. 20 para. 3 and Art. 21 Child Law of 2008.

<sup>159</sup> Art. 20 Child Law. MEGAHEAD/CESARIO, *supra* n. 153, at 469; THOMASON, *supra* n. 14, at 125 f.; AL-AZHARY, *supra* n. 18, at 61.

<sup>160</sup> Art. 4 para. 3, Art. 46 Child Law.

<sup>161</sup> Prime Minister Decree No. 2057 for 2010 issuing the Executive Regulation for the Child Act No. 12 of 1996: Fostering of Children Regulation.

<sup>162</sup> Law No. 6 of 2015; see Arabstoday, 24 January 2015: "Fostering age for abandoned kids lowered to 3 months in Egypt", available at <<http://www.arabstoday.net/en/women/also-in-the-news/fostering-age-for-abandoned-kids-lowered-to-3-months-in-egypt.html>> accessed 01 June 2017. Children at such a young age can be breastfed. Breastfeeding creates a relationship similar to those who are related by blood. This means that the child suckled in infancy is not eligible for marriage to the milk-mother's other children or husband and the family members may mingle relatively freely even after the milk-child has reached puberty. See BALKRISHAN SHIVRAM, *Exploring Gender: Islamic Perspectives on Breastfeeding*, *International Research Journal of Social Sciences*, Vol. 2 (2013), 30-34, at 32.

<sup>163</sup> Regarding milk-kinship, see idem.

## Prerequisites

Under Egyptian law, the following children are eligible for foster care: illegitimate children; abandoned children; children who lost their parents and whose location or place of residence can neither be located by the child nor by the relevant authorities; children whose parents are unable to look after their offspring due to social reasons.<sup>164</sup> Applicants wishing to take a child into *kafalah*, i.e. to enter into a formal care arrangement for him or her,<sup>165</sup> must be married whereby one of the spouses should be of Egyptian nationality; they should have the same faith as the child, be between 25 and 55 years of age and married for at least five years. Furthermore, they must be psychologically and physically healthy, have an income sufficient to provide for the family unit, live in a proper environment with, inter alia, educational and medical facilities, and have enough time to handle the fostering of a child. Finally, they must prove their ability to jointly cover the needs of the family and provide the child taken into *kafalah* with financial and social security. Also, they must give the solemn promise to preserve the ancestry of the child.

Single women, divorcees and widows over the age of forty-five may foster children upon approval by the Alternative Families Committee.<sup>166</sup> The number of children in the applying family should not exceed two, unless they are old enough to depend on themselves. Prospective foster parents must also obtain approval from the Social Solidarity Directorate to provide foster care for more than one child.<sup>167</sup> After a process, which includes a background check by a social worker and the submission of the relevant documents, the Family and Childhood Administration reviews the application which then presents the application as well as the social survey report and other relevant documents to the Alternative Families Committee of the relevant governorate for decision-taking. If the family's application is approved, the applicants have to sign a foster care contract.<sup>168</sup> <sup>169</sup> If the application is rejected, the applicants are entitled to appeal it.<sup>170</sup>

## Effects of the Decision

The foster family has the duty to look after and care for the foster child as a family member and to comply with the relevant authorities regarding the child's future as well as informing them regarding any change in the child's social status, residence and circumstances.<sup>171</sup> The orphaned child

<sup>164</sup> See Art. 85, 86 Fostering of Children Regulation.

<sup>165</sup> The Egyptian Child Law uses the Arabic terminology *ri'āya al-badīla* or *usr al-badīla* for alternative or foster care, see e.g. title chapter 3 and art. 46. Another term used in Egypt is *al-usr al-kāfila*, see YASSARI NADJMA, Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law, The American Journal of Comparative Law, Vol. 63, No. 4 (2015), 927-962, at 951. In this paper, the term *kafalah* is used for consistency reason and in accordance with the literature, which generally refers to this terminology when speaking of an alternative institution for adoption in Muslim jurisdictions. However, this does not mean that the *same* legal structure for the institution of *kafalah* exists in all of these states, see YASSARI, *ibid*, at 949, 950f. For literature that also uses the term *kafalah* in the Egyptian context, see e.g. MOUSSA, *supra* n. 142 at 16; EBNER/HEFNY, *supra* n. 140 at 36; MCLEAN EADIE KIERAN, The application of kafala in the West, in: Nadirsyah Hosen (ed.), Research Handbook on Islamic Law and Society, Cheltenham 2018, 47-76 at 55f.

<sup>166</sup> Art. 89 No. 2, 93 Fostering of Children Regulation.

<sup>167</sup> Art. 89 No. 4 Fostering of Children Regulation.

<sup>168</sup> Art. 90, 93, 101 Fostering of Children Regulation.

<sup>169</sup> Apart from a formal agreement based on a contract between the state authority and foster parents for the support and care of an abandoned child, there is the option for support on a voluntary basis for a child who remains in residence in an orphanage, see MEGAHEAD/CESARIO, *supra* n. 153, at 469.

<sup>170</sup> Art. 90 para. 5 Fostering of Children Regulation.

<sup>171</sup> Art. 89 No. 7, No. 11, Art. 91 Fostering of Children Regulation.



or child with unknown ancestry may add the name of her or his foster family as her or his own, yet without gaining any natural inheritance rights.<sup>172</sup> Notwithstanding this, the foster parents may bequest one-third of their estate to an unrelated person such as a foster child.<sup>173</sup> In addition, they may bestow money or property upon the child during their lifetime.<sup>174</sup>

The law provides that social specialists shall oversee the welfare and progress of the child,<sup>175</sup> and entitles foster parents to certain benefits during and after the end of the foster care period.<sup>176</sup>

### Termination of Placement

The family foster care continues until boys reach the employable age and girls marry.<sup>177</sup> If the foster family infringes upon the regulations of the relevant law, for instance by not following the directives of the social worker or by conducting a lifestyle that negatively influences the psychological or physical health of the foster child, it may be terminated earlier. The *kafalah* placement may also come to an end if either of the foster parents dies<sup>178</sup> or the child is returned to its biological family.<sup>179</sup>

#### c) United Arab Emirates

The United Arab Emirates (UAE) is a federation established in 1971 in the area previously known as the Trucial Coast in the Persian Gulf, consisting of seven Emirates, namely Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Umm Al Quwain, Ajman and Fujairah. The majority of its citizens are adherents to Sunni Islam with Christian, Shia and Hindu minorities. Approximately four-fifth of the population are migrant workers who reside in the country temporarily. They are predominantly Muslims, Christians and Hindus.<sup>180</sup>

According to the UAE Constitution, Islam is the official religion of the federation, and Islamic law (Shari'a) a main source of legislation.<sup>181</sup> As a federation, it has two sets of laws: On the one hand, federal laws and decrees which make up the legal framework of the federation, and on the other hand, the laws and regulations of the individual Emirates. The Emirates have the jurisdiction over subject matters that are not assigned by the Constitution to the exclusive jurisdiction of the Federal Government as well as the right and duty to implement federal laws through local laws and regulations.<sup>182</sup>

<sup>172</sup> Art. 92 Fostering of Children Regulation. See also MOUSSA, Egypt, *supra* n. 142, at 16f.

<sup>173</sup> The Islamic inheritance laws are codified into Law No. 77 of 1943 and Law No. 71 of 1946.

<sup>174</sup> See also Art. 99 Fostering of Children Regulation.

<sup>175</sup> Art. 89 No. 9, 102 f. Fostering of Children Regulation.

<sup>176</sup> See Art. 95 ff. Fostering of Children Regulation.

<sup>177</sup> Art. 87 Fostering of Children Regulation.

<sup>178</sup> See Art. 100 Fostering of Children Regulation.

<sup>179</sup> Cf. Art. 89 No. 11 Fostering of Children Regulation.

<sup>180</sup> The World Factbook, CIA, United Arab Emirates, available at < <https://www.cia.gov/library/publications/the-world-factbook/geos/ae.html> > accessed 01 June 2018.

<sup>181</sup> Art. 7 Federal Constitution of the United Arab Emirates.

<sup>182</sup> See Art 116 ff., 120, 121, 122 and 125 UAE Constitution.

## ca) Family Law and Lineage

In the relatively short period since its establishment, the UAE has passed many important laws. Yet until recently, there was no codified family law in the UAE and the law applied in family matters were the rules of classical Islamic law based on dominant Maliki doctrines. In 2005, the UAE passed its first codified family law, the Federal Law on Personal Status.<sup>183</sup> It covers a wide range of issues considered to be in the realm of family law, such as marriage and divorce, issues arising during and after marriage, rules pertaining to children, and inheritance.<sup>184</sup> The law applies to all citizens as long as the non-Muslims among them (mostly Hindus) do not have their own laws; non-citizens have a choice to subject themselves to the law.<sup>185</sup>

According to the UAE Personal Status Law, the *nasab* to the mother is acquired through birth.<sup>186</sup> In order to be legitimately affiliated to the father and acquire a *nasab*, the law requires that the child must be born under a valid marriage within the minimum term of pregnancy after the conclusion of the marriage contract. If the spouses think they are legally married but the marriage contract is defective, the child is attributed to the husband if he or she is born within the minimum terms of pregnancy counted from the time of consummation of the (defective) marriage.<sup>187</sup> The other alternatives to establish *nasab* are acknowledgement, evidence and “scientific methods if the conjugal bed is established”.<sup>188</sup> Here, the law refers to methods such as DNA-testing.<sup>189</sup> In any case, for illegitimate offspring paternity cannot be established. Extramarital relationships are considered a crime under the UAE Penal Code.<sup>190</sup>

The husband can refute paternity through the traditional process of *li'an* if he has not admitted to his paternity or consented in the child's being attributed to him previously.<sup>191</sup> During the court proceedings, the judge can have recourse to “scientific methods” in order to clarify the question of paternity.<sup>192</sup> If the *li'an* procedure is successful, the child will not be attributed to the wife's husband and the spouses will be separated definitely.<sup>193</sup>

Marriage is the exclusive framework for licit sexual relations and legitimate offspring. Because sex outside of marriage is illegal, the women – many of whom are migrant workers – often conceal their pregnancies and abandon their babies shortly after giving birth.<sup>194</sup> The UAE does not endorse a

<sup>183</sup> UAE Federal Law No.28 of 2005 on Personal Status of 19 November 2005, Official Gazette No.439, November 2005.

<sup>184</sup> See e.g. WELCHMAN LYNN, First Time Family Law Codifications in Three Gulf States, in: Bill Atkin (ed.), The International Survey of Family Law, 2010 Edition, Bristol 2010, 163–178, at 164.

<sup>185</sup> Art. 1 UAE Federal Law on Personal Status.

<sup>186</sup> Art. 60 No. 2, 90 f. UAE Federal Law on Personal Status. The minimum and maximum terms of pregnancy are 180 and 365 days respectively, “unless a medical committee established for this purpose decides otherwise”.

<sup>187</sup> 180 and 365 days respectively, “unless a medical committee established for this purpose decides otherwise”, see Art. 89ff. UAE Federal Law on Personal Status.

<sup>188</sup> Art. 89 UAE Federal Law on Personal Status.

<sup>189</sup> WELCHMAN, *supra* n. 2, at 145.

<sup>190</sup> Cf. Art. 356 Federal Law No. 3 of 1987 on the Penal Code.

<sup>191</sup> Art. 96, 97 No. 1 UAE Federal Law on Personal Status.

<sup>192</sup> Art. 97 UAE Federal Law on Personal Status.

<sup>193</sup> Art. 96 No. 1 and Art. 97 No. 2 UAE Federal Law on Personal Status.

<sup>194</sup> See, e.g., Al Jazeera, 6 March 2015: “Adopting Orphans Breaking Taboos in Dubai”, available at <<http://www.aljazeera.com/news/2015/03/adopting-orphans-breaking-taboos-dubai-150302080741099.html>> accessed 01 June 2018.

system of adoption that severs a child's lineage to her or his biological parents. As such, the UAE laws do not expressly prohibit adoption, but it is commonly agreed that UAE nationals, which are mostly Muslims, cannot adopt.<sup>195</sup> They should turn to fosterage instead which is considered as a worthy deed and permitted according to the precepts of Islam.

#### *cb) The Fosterage of Abandoned Children*

### **In General**

Until 2011, the fosterage of children was not regulated in the UAE. In early 2012, the UAE President Shaikh Khalifa Bin Zayed Al Nahyan issued a law on the protection and care for abandoned children.<sup>196</sup> The law created a system involving the Ministry of Social Affairs and the Ministry of Interior to provide care for children without parental support and lays down the criteria and process by which foster families are being chosen. The law not only aims at securing the care of abandoned children in order to secure their health, education and social integration, but also stipulates their protection from abuse and cruel treatment.<sup>197</sup> This is in line with Article 16 of the UAE Constitution which states: "Society shall be responsible for protecting childhood (...) and shall protect minors and others unable to look after themselves for any reason, such as illness, disability (...). It shall be responsible for assisting and enabling them to help themselves for their own benefit and that of the community. Such matters shall be regulated by welfare and social security legislations."

### **Prerequisites**

According to Federal Law 1 of 2012 on the care for abandoned children, an abandoned child is one found inside the borders of the UAE who has no known parents.<sup>198</sup> Anyone who finds an abandoned infant must deliver him or her to the police including anything found on the child. The police notify the Public Prosecutor and hand over the child to the designated health centre. A doctor estimates the age of the infant and gives him or her the necessary care.<sup>199</sup> The Public Prosecutor then assigns the child to an orphanage with the approval of the two involved ministries. There, the child is given a name.<sup>200</sup> According to the law, abandoned children are eligible for Emirati citizenship.<sup>201</sup>

Anyone wishing to foster a child must be an Emirati national residing in the UAE<sup>202</sup>; he or she must be Muslim and married and be at least 25 years of age. According to the relevant law, single men are not eligible and single women (unwed, widowed or divorced) must be at least 30 years of age. Further, the hosting family or single mother should be free from infectious diseases<sup>203</sup> and should not suffer from psychological and mental disorders. The hosting family or single mother must be

<sup>195</sup> Adoption is possible for foreign, non-Muslim expatriates living in the UAE. The adoption process follows the rules of their own national laws.

<sup>196</sup> Federal Law No. 1 (2012) on the care of abandoned children (hereinafter "Abandoned Child Law"). Executive by-laws are planned to be released soon.

<sup>197</sup> Art. 2 UAE Abandoned Child Law.

<sup>198</sup> Art. 1 UAE Federal Abandoned Child Law.

<sup>199</sup> Art. 3 UAE Federal Abandoned Child Law.

<sup>200</sup> This name shall not imply that the child is of unknown parentage. See Art. 3 para. 5 UAE Federal Abandoned Child Law.

<sup>201</sup> Art. 3(e) UAE Federal Law No. 17/1972 concerning nationality and passports, amended by Federal Law No. 10/1975; Art. 3, Art. 5 para. 1 UAE Federal Abandoned Child Law.

<sup>202</sup> See Art. 10 UAE Federal Abandoned Child Law for the eligibility criteria.

<sup>203</sup> Exceptions are possible: cf. Art. 10 para. 2 UAE Federal Abandoned Child Law.

financially capable to provide a decent living to the foster child as well as the members of their own families, and they must not have a criminal record.<sup>204</sup>

In the Emirate of Dubai, the Community Development Authority is the responsible authority for the care of abandoned children.<sup>205</sup> The person or persons wishing to foster a child have to apply to the CDA by submitting a form accompanied by a number of documents (e.g., certificate of clearance of infectious diseases, salary certificate). A social worker assesses the family and their living circumstances through interviews and home visits.<sup>206</sup> The Commission then decides on the eligibility of the family or single person and informs them accordingly. After placement, social workers monitor the wellbeing of foster children by visiting the foster families and by an annual health check.<sup>207</sup>

### Effects of the Decision

The child is referred to the family for a trial period of six months after which the foster care becomes permanent.<sup>208</sup> Foster parents have to sign an undertaking that they will treat the child well, provide her or him with secure living conditions and that he or she may grow up in an Islamic and social environment. The law specifies that the foster parents are to take care of the child's needs, such as giving it a home, clothing, and sustenance, and cater to the health and social life of the child according to his or her age. In addition, they must allow her or him to interact with other children, and provide for her or his education.<sup>209</sup> The law further stipulates that fostering is a gift of care and that the foster parents are not entitled to any remuneration.<sup>210</sup>

Since the foster parents are to take care of the child in the same way as if the child were their biological offspring, they must care and bring him or her up according to the rules laid down in the Personal Status Law.<sup>211</sup> In case of a girl, maintenance continues until her marriage and in case of a boy until he is able to finance his own livelihood or he finishes his studies. If the male child is disabled or the female widowed or divorced, the maintenance obligation of the father continues or reverts to him.<sup>212</sup> However, no inheritance rights are established to the foster parents. Indeed, according to Islamic law, they may bequeath a maximum of one-third of their estate to an unrelated person.<sup>213</sup>

<sup>204</sup> The by-laws are yet to be released: The National, 9 February 2014: "Shelter is required before UAW can enforce abandoned child law", available at <<http://www.thenational.ae/uae/government/shelter-is-required-before-uae-can-enforce-abandoned-child-law>> accessed 01 June 2018.

<sup>205</sup> According to Art. 7, 8 UAE Federal Abandoned Child Law, each Emirate has its own commission to identify eligible foster families.

<sup>206</sup> See Art. 8, 9, 13 UAE Federal Abandoned Child Law.

<sup>207</sup> Cf. Art. 8, 12, 13, 14 UAE Federal Abandoned Child Law.

<sup>208</sup> Art. 9 para. 2 UAE Federal Abandoned Child Law.

<sup>209</sup> Art. 5 UAE Federal Abandoned Child Law.

<sup>210</sup> Art. 15 UAE Abandoned Child Law.

<sup>211</sup> See Art. 5, 10 UAE Abandoned Child Law.

<sup>212</sup> Art. 78 UAE Federal Law on Personal Status.

<sup>213</sup> Art. 243 UAE Federal Law on Personal Status.

## Termination of Placement

The foster care ends when the child comes of age;<sup>214</sup> foster parents fail to provide for the child in accordance with the rules of the law;<sup>215</sup> or the biological parents come forward;<sup>216</sup> or the foster child dies.<sup>217</sup> In case of divorce of the foster parents or the death of one spouse, the continuation of the foster arrangement may be ruled.<sup>218</sup>

## V. Appraisal and Concluding Remarks

In the three countries under review, Morocco, Egypt and the UAE, adoption in the sense of integrating a child into one's own family by legally giving him or her an equal status to the one of a biological child is either not legally possible, or not possible for people with certain faiths, namely Muslims. By contrast, fostering is legally permitted in all three countries. A special emphasis is laid on the faith: In Morocco and the UAE, the applicants must be a Muslim couple or a Muslim single woman, in multi-faith Egypt, the couple or single woman must have the same faith as the child. In line with Islamic legal precepts, foster arrangements in these three countries have no effect on lineage like adoption. However, they offer a family-based solution for children deprived of family for reasons such as orphanage or birth out of wedlock by recognising the role family plays in the development and growth of young children.

In contrast to adoption, the fostering arrangements under review offer a certain flexibility allowing for adjustments in case the child's individual situation changes; such may be given if reintegration into the birth family becomes possible or the arrangement with the foster parents does not work out in the best interest of the child. However, it must be pointed out that such revocation possibilities also have their downfalls, namely the uncertain legal status of the child, and possible emotional hardship. This said, under the national laws of Egypt, Morocco and the UAE fostering is designed to be a permanent arrangement for a child without parental care. The permanence factor is reflected in the fact that termination is only possible in special circumstances.

As has been outlined, *nasab* identifies the lineage of a person and typically is a patronym (i.e., name of the father) or a series of patronyms in both historical and modern Islamic legal frameworks. Lineage indicates the parentage of a child and consequently the establishment of all legal rights and claims. Since lineage can only be established through blood (kinship) and marriage, a fostered child (child under *kafalah*) will retain her or his father's or mother's name, if known, or will be named by officials, if unknown. Perhaps in an effort to atone the stigma of not having the father's or family's last name, in Morocco the child's last name may be aligned to the *kafil*'s name by an official act, and

<sup>214</sup> According to Art. 85 UAE Federal Law on the Civil Transactions Law (Civil Code), a person comes of age at the age of 21.

<sup>215</sup> Art. 14 UAE Federal Abandoned Child Law provides the following: If the foster parents fail to comply with their rights and duties, they are reminded to discharge their duties. If they still fail to comply with the rules laid down by law, they are cautioned. If foster parents continue to disregard their duties, the fostering arrangement is put to an end, and another family is given the right to take the child into foster care.

<sup>216</sup> If the biological parents reclaim the child, they must prove that they are the biological parents before the court issues a ruling to this effect, and the child will be re-registered: Art. 17 f. UAE Federal Abandoned Child Law.

<sup>217</sup> Art. 20 para. 1 UAE Federal Abandoned Child Law.

<sup>218</sup> According to Art. 14 UAE Federal Abandoned Child Law, a relative may claim the right to foster the child in place of the deceased foster parent.



in Egypt the foster family's name might be added to one's own. As far as can be seen, in the UAE the child keeps the name attributed to them by the officials. Furthermore, since the biological family bonds are preserved in all three countries by a fostering arrangement, the child has no inheritance rights towards their fostering parents. It is however possible to grant him or her limited inheritance rights by drawing up a will and thus enabling the child to inherit a certain portion of the foster parent's fortune.

Modern-day fostering arrangements as mirrored in the laws of Morocco, Egypt and the UAE certainly have benefits for children deprived of a family environment. However, because of the obvious challenges of this type of system, effective monitoring and regular follow-ups by officials are vital components in order to prevent or deflect a placement for economic reasons and children's exploitation. Also, the high prevalence of abandoned children namely in Egypt and Morocco highlights the need to develop preventive and inclusive programs for the support of single mothers especially. Besides their own "illegitimate" children, these individuals are most vulnerable in societies with patriarchal structures, where giving illegitimate birth (birth out of wedlock) may be considered as a transgression against "family honour".